

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAY DON ROSS)	
Claimant)	
VS.)	
)	Docket No. 195,906
BEECH AIRCRAFT CORPORATION)	
Respondent)	
Self-Insured)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Both claimant and respondent requested review of the Award dated May 31, 1996, and Nunc Pro Tunc Order dated June 5, 1996, both entered by Assistant Director David A. Shufelt. The Appeals Board heard oral argument on November 13, 1996, in Wichita, Kansas.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for the respondent. Christopher Cole of Wichita, Kansas, appeared in place of attorney Steven L. Foulston for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Assistant Director awarded claimant permanent partial general disability benefits based upon the stipulated 9 percent whole body functional impairment rating. Also, the Assistant Director denied respondent's request to assess the award against the Workers Compensation Fund. Claimant asked the Appeals Board to review the issue of nature and extent of disability. Respondent asked the Appeals Board to review the issue of Fund liability. Those are the only two issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award and Nunc Pro Tunc Order entered by the Assistant Director should be affirmed.

(1) The Appeals Board agrees with the Assistant Director's conclusion that claimant is entitled to permanent partial disability benefits based upon the stipulated 9 percent whole body functional impairment rating.

Claimant alleged a period of accident occurring between February 29, 1994, and October 19, 1994. The Assistant Director found May 1, 1994, as the date of accident. At oral argument the parties stated that they did not request review of that finding. Therefore, that date will be accepted as the date of accident and utilized by the Appeals Board for purposes of this review.

The issue of whether claimant had a preexisting functional impairment which should be subtracted from the ultimate award of compensation as contemplated by K.S.A. 44-501(c) was hotly contested. Based upon the testimony of claimant's chiropractor, Dennis W. Guy, the Appeals Board finds that claimant did not have a preexisting functional impairment arising from his upper back before February 1994 when claimant began experiencing symptomatology related to this injury. Further, claimant's expert medical witness, Ernest R. Schlachter, M.D., also testified to that effect. Among the three doctors who testified, Dr. Guy was in the best position to determine whether claimant was impaired or should have been under medical restrictions before February 1994. He testified that before February 1994 claimant was neither impaired nor in need of medical restrictions. The Appeals Board finds the reduction in compensation directed by K.S.A. 44-501(c) is not applicable.

The Appeals Board also agrees with the Assistant Director's conclusion that claimant's permanent partial general disability benefits should be limited to the functional impairment rating. The Appeals Board finds that respondent accepted claimant back to work after his medical release and that claimant's own conduct caused his termination. Because respondent believed that claimant's medical restrictions form was altered by or

at claimant's direction, respondent terminated claimant. The Appeals Board finds that it is more probably true than not that claimant's medical restrictions form was altered between the time that claimant obtained it from Dr. Michael P. Estivo's office and the time he presented it to the respondent's medical department. The Appeals Board also finds that claimant could have remained in respondent's employ and would have earned a comparable wage if the medical restrictions form would not have been altered. Although claimant denied that he altered the document, the Appeals Board is not persuaded that claimant does not know how the unauthorized alteration occurred. Claimant's credibility is questionable. Despite being sworn under oath, at regular hearing claimant falsely testified regarding the facts surrounding his termination at El Dorado Correctional Facility following his employment with the respondent, leaving the Appeals Board to conclude that claimant's testimony must be viewed with a jaundiced eye.

Conceptually, the facts of this case do not differ from those of Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), the rationale of which the Appeals Board has held should apply to those accidents occurring on and after July 1, 1993. At page 284 of the Foult decision, the Court wrote:

"The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage."

(2) The Appeals Board also agrees with the Assistant Director that the Workers Compensation Fund has no liability in this proceeding. First, based upon Dr. Guy's testimony, the Appeals Board finds that before February 1994 claimant did not have a preexisting impairment which would handicap him from obtaining or retaining employment. As both Dr. Guy and claimant testified, any symptomatology that claimant experienced involving the upper back before February 1994 resolved and did not limit him in any manner. Second, respondent did not have knowledge of any condition that could be considered significant enough to constitute an impairment. Respondent knew of an incident involving upper back symptomatology which was reported in November 1992. However, any injury arising from that incident resolved and claimant returned to work for respondent without medical restrictions after seeing the company nurse and company doctor each on one occasion. Between December 1992 and February 1994, claimant did not return to respondent's medical department for any type of back problem.

Because of the above finding that claimant was not handicapped before February 1994, the respondent's argument that claimant made intentional misrepresentations is rendered moot. K.S.A. 44-567(c) provides that intentional misrepresentation may

substitute for actual knowledge of preexisting handicap under certain circumstances. However, before the issues of knowledge or misrepresentation are reached, it must first be determined that claimant had a preexisting handicap, which he did not.

(3) The Appeals Board hereby adopts the Assistant Director's findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated May 31, 1996, and Nunc Pro Tunc Order dated June 5, 1996, both entered by Assistant Director David A. Shufelt should be, and hereby are, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Terry J. Torline, Wichita, KS
Steven L. Foulston, Wichita, KS
Office of Administrative Law Judge, Wichita, KS
David A. Shufelt, Assistant Director
Philip S. Harness, Director